

SHIFTING THE CHARACTER OF THE CONSTITUTIONAL COURT DECISION INFLUENCED BY POLITICAL CONSTELLATION IN INDONESIA

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Abstract

Recently, the decisions of the Constitutional Court have become one of the focuses in the dynamics of Indonesian state administration. This research discusses the relevance of political constellation in Indonesia and its influence on the changing character of several constitutional court decisions from self-executing to non-self executing. This research aims to find out how the legal impact of shifting the character of the Constitutional Court's decision in its implementation. This research is a normative study supported by a law, case and conceptual approach. The data used are secondary data, obtained by means of a literature research which is then arranged systematically and analyzed with qualitative analysis. From the results of the analysis it is known that the shift in the character in several decisions of the Constitutional Court was carried out as an effort to offset the political constellation in the legislators. The character shift is done in the hope that it can guarantee the execution of the Constitutional Court's ruling and can be followed up on by the decision of the ruling. This shows that Constitutional Court judges are trying to find a legal breakthrough in the corridor of judicial activism to make an ideal constitutional review decision.

Keywords: Constitutional Court, Judicial Activism, Non-Self-Executing, Political Constellation.

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I. INTRODUCTION

The written constitution is in principle, the most important legal and political remedy for the implementation of constitutionality. Therefore it is necessary for the functioning of each democratic political system that a constitution is implemented. The top principle of existence and functioning of the democratic society and a state governed by the rule of law is the supremacy of the Constitution, which is at the same time the principal concept of the constitutional review. In the constitutional review discourse, there is a firm conviction that law enforcement must be able to give meaning to the state system, especially to uphold basic human rights in the constitution.¹ The diversity and complexity of successful constitutional cultures, that it is possible to conceive of many different yet equally reasonable ways to address each area of constitutional concern.²

The constitutional court's power to supervise the development of ordinary law, however, will almost inevitably be limited.³ The ideas and legal theories of Kelsen and his model of the court as a negative legislator have influenced the design of specialized constitutional courts in the Western world. Kelsen, in accordance with his positivist jurisprudence, believed in a strict hierarchy of law and that ordinary judges should only apply a law that is legislated by the parliament. Kelsen believed that the constitution ought to be the supreme law of the land and that no statute could violate it.⁴ To effectively restrain the legislature and ensure the compatibility of law with the higher normative order of the constitution, Kelsen believed, a special, extrajudicial organ was necessary. The Kelsenian model establishes a centralized body outside of the structure of the conventional judiciary to exercise constitutional review and act as the guarantor of the constitutional order. This body, typically called a constitutional court, operates as a negative legislator because it has the power to reject but

¹ Lawrence M. Friedman, *Hukum Amerika Sebuah Pengantar [American Law An Introduction]*, trans. Wishnu Basuki (Jakarta: PT. Tata Nusa, 2001), 252-253.

² Ken I. Kersch, "The New Legal Transnationalism, the Globalized Judiciary and the Rule of Law," *Washington University Global Studies Law Review* 4, no. 2 (2005): 367.

³ Mark Tushnet, "The issue of state action/horizontal effect in comparative constitutional law", *I.CON. International Journal of Constitutional Law* 1, no. 1 (January 2003): 86.

⁴ Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation", *German Law Journal* 9, no. 10 (2008): 1299.

not propose legislation.⁵ Some features of constitutional courts also press them in the direction of activism.⁶

In the construction of the Indonesian Constitution, the institutions tasked with guarding and ensuring the constitutionality of the law are the Constitutional Court of the Republic of Indonesia (hereinafter abbreviated as MK). Through its decision, it not only fulfills the role of guarantor of constitutional supremacy but also contributes to the understanding and application of fundamental principles in the law or rule of law.⁷ The Constitutional Court can assess and decide the act that has been ratified by the President if it is true that the act passed by the President violates the normative provisions of the regulation above (in this case the 1945 Constitution). Therefore, the Constitutional Court can state that the Law is null and void in part or in the whole of the articles of the law submitted for “constitutional review”. Reviewing of the Act by the Constitutional Court is an assessment of political products created between the president and the legislative council or regional council on the material of a law. So that the product of the law created and approved by the president really does not conflict with the 1945 Constitution or the interests of community rights. In constitutional cases,⁸ whenever the text is vague, legislatures have a free choice in borderline cases and cannot be second-guessed by judges.

The Constitutional Court of the Republic of Indonesia is one of the state institutions that always attract the attention of many circles, not least related to the decisions produced regarding the reviewing of laws. Initially the decision to review the law is only in the form of an amber that grants an application, declares that the application cannot be accepted and rejects the application for part or all by stating a law, article, paragraph or phrase contradicts the 1945

⁵ Tom Ginsburg, “Building Reputation in Constitutional Courts: Political and Judicial Audiences,” *Arizona Journal of International & Comparative Law* 28, no. 3 (2011): 540.

⁶ Victor Ferreres Comella, “The European Model of Constitutional Review of Legislation: Toward Decentralization?” *International Journal of Constitutional Law* 2, no. 3 (2004): 484.

⁷ Daniela Cristina Valea, “The Role of the Romanian Constitutional Court in Protecting and Promoting Human Fundamental Rights and Freedoms,” accessed August 2, 2018, https://www.researchgate.net/publication/271880289_The_Role_of_the_Romanian_Constitutional_Court_in_Protecting_and_Promoting_Human_Fundamental_Rights_and_Freedoms.

⁸ Randy Barnett, “Interpretation and Construction,” *Harvard Journal of Law and Public Policy* 34, no. 12 2011: 69.

Constitution of the Republic of Indonesia and states that it has no binding legal force (legally null and void).⁹ But today the Constitutional Court has also created a variant of the decision, namely a conditionally unconstitutional decision; a conditionally constitutional decision; decisions that delay the application of the decision (limited constitutional); and decisions that formulate new norms.¹⁰ The Constitutional Court through the four variants of the decision is often considered to have changed its role from negative legislature¹¹ to positive legislature.¹² The Constitutional Court in this corridor made itself as the third room in the legislative process because it cannot be denied that the variant of the decision influenced the legislative process in the legislature. This is an external control tool that is owned by the Constitutional Court to carry out purification of the legal products produced by the legislative institution despite the polemic of the Constitutional Court as a positive legislature.

At the next level, the variant of the Constitutional Court's decision as mentioned above carries its own dynamics in the character of the Constitutional Court's decision. This can be seen from the decision which tends to need further regulation.¹³ Another thing that also needs to be considered is that considering the norms in the law are a unified system, there is an implementation of decisions that must go through certain stages that depend on the substance of the relevant decision. In this case, there are decisions that can be directly implemented without having to make new regulations or changes and some need further regulation first.¹⁴ When a decision will be effective immediately

⁹ As stipulated in Article 56 paragraph (3) and Article 57 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court.

¹⁰ Syukri Asy'ari, et.al, *Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012) [Model and Implementation of Constitutional Court Decisions in Constitutional Review (Study of Decisions of 2003-2012)]* (Jakarta: Case Research and Assessment Center, Management of Information and Communication Technology of the Constitutional Court of the Republic of Indonesia, 2012), 2.

¹¹ Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961), 286.

¹² Allan R. Brewer-Carias, *Constitutional Court as Positive Legislators: A Comparative Law Study* (Cambridge: University Press, 2013), 8.

¹³ Martitah stated that the Constitutional Court's decision had two characteristics, namely a verdict whose nature could be directly implemented and a verdict whose nature needed further regulation. See in Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* [Constitutional Court: From Negative Legislature to Positive Legislature?] (Jakarta: Konspress, 2013), 28.

¹⁴ "Kekuatan Mengikat dan Pelaksanaan Putusan MK [The Binding Strength and Implementation of the Constitutional Court's Decision]," Muchamad Ali Safa'at, accessed August 1, 2018, <http://safaat.lectu.re.ub.ac.id/files/2014/03/Kekuatan-Mengikat-dan-Pelaksanaan-Putusan-MK.pdf>.

without the need for further action in the form of the need to implement the amended law, this decision can be said to be self-executing,¹⁵ in the sense that the decision is carried out by itself. This happens because the negated norm has certain characteristics that can be applied automatically without changes or with changes in laws that contain the norms reviewed and negated. In the end, the decision to review the law is not only directly executable but also those that cannot be directly executed (not self-executing). This is one of the dynamics that occur related to the shift in the character of the Constitutional Court's decision regarding the review of the law.

The example of the Constitutional Court's decision which can be said to be non self-executing is the Constitutional Court Decision Number 110-111-112-113/PUU-VII/2009 concerning the Determination of Seats Phase II in the 2009 Legislative Elections. The material review related to the ruling on Article 205 paragraph (4) and Article 212 paragraph (3) of Law Number 10 Year 2008 concerning General Elections for Members of the People's Legislative Assembly, the Regional Representative Council and the Regional People's Representative Council. At the level of implementation, this decision still requires legal instruments that are operational. This is due to the fact that in the ruling, the Court issued a ruling with the effect of retroactive laws for the first time. So, the Constitutional Court's decision is very clear in its execution requires regulations to "turn on" the retroactive provisions made by the Constitutional Court.

The dynamics that occur as mentioned above, regarding the changes in the character of the Constitutional Court's decision are basically influenced by Indonesia's political conditions which influence the Constitutional Court Judges. The Constitutional Court Judge must try to find legal breakthroughs in the corridor of judicial activism to create an applicable Constitutional Court decision. Adressat's¹⁶ decision which often ignores the Constitutional Court's decision and policy makers who seem not to comply with the Constitutional Court's decision

¹⁵ Maruarar Siahaan, "Peran Mahkamah Konstitusi dalam Penegakan Hukum Konstitusi [The Role of Constitutional Court in Law Enforcement of the Constitution]," *Journal of Hukum* 16, no. 3 (July 2009): 364.

¹⁶ Adressat can be interpreted as a party affected by these norms. Based on this understanding, the authors interpret the decision adressat is the party affected by the enforcement of the decision, especially the decision of the Constitutional Court.

makes the Constitutional Court's decision cannot be implemented so as to create a state that remains unconstitutional. Law is indeed a political and legal product that underlies policies. So it cannot be denied that politics influence the policies made. On this basis, the Constitutional Court Judges finally created a variant of the decision as explained so that inevitably policy makers must follow up. If the decision on the dispute over the results of the general election, the decision of the Constitutional Court will affect the political constellation in Indonesia differently from the decision of the judicial review. The decision in its implementation was strongly influenced by the political constellation. The law is a product of politics itself so that decisions related to this matter will also be influenced by the ongoing political constellation.

Based on the above background, the problem raised in this study is whether the political constellation in Indonesia affects the shift in the character of the Constitutional Court's decision from self-executing to non-self-executing and does it have a legal impact on the implementation of the Constitutional Court's decision?

II. RESULT & DISCUSSION

2.1. Origin of the Concept of Self Executing to Non-Self Executing

The Constitutional Court has affirmed itself as a guardian of democracy which upholds the principles of substantive justice in every decision,¹⁷ therefore the Court is judged as a judicial institution whose performance and authority are guided by the enforcement of the rule of law and constitutional supremacy. The Constitutional Court also functions as a derivation of its citizens, namely as the guardian of constitution, the interpreter of constitution, the protector of citizen constitutional rights and the protector of human rights.¹⁸ The court

¹⁷ Constitutional Court of the Republic of Indonesia, "Mengawal Demokrasi Menegakkan Keadilan Substantif [Guarding Democracy Upholding Substantive Justice]" (Jakarta: Annual Report of Constitutional Court, 2009), 8.

¹⁸ Badan Pembinaan Hukum Nasional, "Efektivitas Peran Mahkamah Konstitusi Sebagai Penjaga Konstitusi (Perspektif Pembinaan Hukum dan Demokrasi) [The Effectiveness of the Role of the Constitutional Court as the Guardian of the Constitution (Perspective of Law and Democracy Development)]," *Paper* presented in Continuing Legal Education (CLE) at the Center for Research and Development of BPHN, (Ministry of Law and Human Rights, dated, May 3, 2013, Jakarta), 2.

accepts that the constitution protects, by implication, measures of freedom of political communication and resolves the main contours of the doctrine.¹⁹

The 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law affirm that the Constitutional Court is a court of first and final level whose decisions are final and binding. Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states, among other things, "The Constitutional Court has the authority to try at the first and final level whose decisions are final." Article 47 of the Constitutional Court Law states, "The Constitutional Court Decision obtains permanent legal force since its completion in the open plenary session for the public." As determined by determined by Article 47 that the decision is directly binding since it was pronounced at the plenary session open to the public.

The effect of the existence of the Constitutional Court's decision which has permanent legal power is that it is prospective looking forward and not backward looking.²⁰ This means that all legal actions that were previously considered legitimate or illegitimate did not turn out to be illegitimate or become valid only because the Constitutional Court's decision was binding since the pronouncement in the plenary session was open to the public. Legal actions carried out based on laws that have not been declared as having no binding legal force are legal actions that are legally valid, including the consequences of legal acts that are also legally valid. Though civil law countries usually have different specialized courts with well-defined jurisdictions (such as administrative, tax, or labor), these tend to be depoliticized and fairly deferential to the other branches of government. The constitutional courts, however, appear more political and qualitatively different from regular courts-hardly surprising since one goal of the Kelsenian theory was insulation of ordinary courts from politics.²¹

The final nature of the Constitutional Court's decision shows that the Constitutional Court's decision directly obtained legal force and the Constitutional

¹⁹ Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law," *Indiana Journal of Global Legal Studies* 13, no.1 (Winter 2006): 43.

²⁰ Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* [Procedural Law of Constitutional Review] (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2005), 318-319.

²¹ Donald P. Kommers, "An Introduction to the Federal Court," *German Law Journal* 2, no.9 (2001): 30.

Court's decision had legal consequences for all parties relating to the decision. This is because the Constitutional Court's decision is different from the general court ruling which only binds parties (*inter parties*). All parties must comply with and implement the Constitutional Court's decision. In the Constitutional Court's decision related to the judicial review of the law for example, if the Constitutional Court decides an Act against the Constitution and declares it has no binding power, the decision is not only binding on the party who filed a case in the Constitutional Court but also binding for all citizens (*erga omnes*).²² Besides that the Constitutional Court ruling also applies the principle of *res judicata pro veritate habetur*, meaning that the judge's decision must be considered correct and must be carried out. So that there is no reason not to carry out the Constitutional Court's decision, even without any forced efforts by any party to carry out the Constitutional Court Decision (the principle of self-respect).²³ The Constitutional Court is also due to being the first and last court, so there is no other legal effort that can be taken. A decision if no legal remedy can be taken means that it has a permanent legal force (*in kracht van gewijsde*) and obtains a binding force (*resjudicata pro veritate habetur*).²⁴

The decision of the Constitutional Court since it was pronounced before a court that is open to the public can have three powers, namely:²⁵

2.1.1. Binding Power

The power of binding on the Constitutional Court's ruling is different from that of an ordinary court, not only includes parties who are litigants, namely the applicant, government, House of Representatives (DPR)/ House of Regional Representatives (DPD), or related parties who are permitted to enter the proceedings, but the decision is also binding on all people, state institutions,

²² Machmud Aziz, "Pengujian Peraturan Perundang-Undangan dalam Sistem Peraturan Perundang-Undangan Indonesia [Judicial Review in the Indonesian Legislation System]," *Journal of Konstitusi* 7, no. 5 (October 2010): 132.

²³ Widodo Ekatjahjana, "Mencermati Ratio Decendi MK dalam Putusan Nomor 122/PUU-VII/2009 tentang Penderogasian Norma Hukum dan Sifat Putusan PTUN [Observing Ratio Decendi in Decision Number 122/PUU-VII/2009 concerning the Derogation of Legal Norms and the Character of PTUN Decisions]," *Journal of Konstitusi* 7, no. 5 (October 2010): 8.

²⁴ Fajar Laksono Soeroso, "Aspek Keadilan dalam Sifat Final Putusan Mahkamah Konstitusi [The Justice Aspect in the Final Nature of the Constitutional Court's Decision]," *Journal of Konstitusi* 11, no. 1 (March 2014): 66.

²⁵ Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia [The Procedural Law of the Constitutional Court of the Republic of Indonesia]* (Jakarta: Sinar Grafika, 2012), 214.

and legal entity within the territory of the Republic of Indonesia. This applies as a law as created by law makers. Constitutional Court Judges are said to be negative legislators whose decisions are *erga omnes*, aimed at all people.

2.1.2 Strength of Proof

Article 60 of the Constitutional Court Law stipulates that the material contained in the paragraph, article and/or part of the law that has been reviewed cannot be appealed for review. Thus, the decision of the Court that has reviewed a law is a proof that can be used that has obtained a definite power (*gezag van gevijsde*). It is said that the definite strength or *gezag van gevijsde* can be negative or positive. The definite strength of a decision is negatively interpreted as saying that the judge may no longer decide on a case for an application that was previously decided as referred to in Article 60 of the Law of the Constitutional Court. In civil law, this is interpreted, only if the same party is submitted with the same subject matter. In relation to the constitutional case whose verdict is *erga omnes*, the petition for reviewing the same material has been decided. The decision of the Constitutional Court which has the legal power to remain so can be used as a positive proof of force with certainty that what has been decided by the judge has been considered correct. The opposite proof is not permitted.

2.1.3 Executorial Strength

As a legal act of a state official intended to end a dispute that will nullify or create a new law, then, of course, it is expected that the decision is not only dead words on paper. As a judge's decision, each person will then talk about how it will be implemented in reality. However, as mentioned above, it is different from the ordinary judge's decision, then a decision that has been binding on the parties in a civil case gives the party won the right to request that the verdict be executed if it concerns the punishment of the loser to do something or pay a sum of money. In such a case it is said that the decision that has permanent legal force has executive strength, namely that the decision is carried out and if necessary by force.

The problem arises when the power mentioned above is only oriented to the normative reality, whereas in reality the decision of constitutional review only ends without proper implementation. The execution of the ruling of the Constitutional Court has been deemed to have materialized with the announcement of the decision into the State Gazette as ordered by Article 57 paragraph (3) of the Law of the Constitutional Court. Of course, this is an ambiguous matter considering the function of the Constitutional Court as a guardian of the constitution, not only as a mere constitutional jewelry. Therefore it is not surprising that when in its development the Constitutional Court positioned itself as a positive legislature in several decisions of constitutional review. Even this reflects that the Constitutional Court judges tried to apply judicial activism in their decisions to take legal breakthrough steps to minimize politicization in the implementation of the Constitutional Court's decision.

The Constitutional Court Decision which states that an article does not have binding legal force must be contained in the State Gazette within a period of no later than 30 (thirty) working days after the decision is pronounced (Article 57 paragraph (3) of the Constitutional Court Law). The link between the revision and amendment to the law has absolutely nothing to do with the implementation of the Constitutional Court's decision. The amendment to the Act is carried out only to synchronize with the articles which have been declared as having no legal force binding by the Constitutional Court. The implementation of the null and void decision model that can be directly implemented (self-executing) is the initial design of the existence of a constitutional court whose decision eliminates a norm if it is contrary to the constitution. The existence of the Constitutional Court as a negative legislator, as introduced by Hans Kelsen is through a statement to abolish a legal situation (declaratory) by not requiring a special apparatus to carry out a declaratory decision. Decisions stating the material content of articles, paragraphs, or parts of the law, even the law as a whole is contrary to the constitution and does not have binding legal force can

be automatically removed from the relevant law and no longer valid. In general, the decisions of the Constitutional Court that are self-executing can be found in the decision model that legally revokes and states that they are not valid (null and void).²⁶ The Constitutional Court's decision in reviewing constitutional declaratory laws means that the Constitutional Court ruling eliminates a new legal situation or establishes a new law as a negative-legislator.²⁷ Declarative nature does not require one apparatus to carry out the decision of the Constitutional Court. The Constitutional Court, because of its authority in adjudicating at the first and last level whose decisions are final and binding to examine the law against the constitution, has the right to interpret the constitution (the final interpreter of the constitution).²⁸ Over time, not all of the Constitutional Court's decisions that granted the petitioners' petition could be directly implemented (self-executing) because in the implementation of the Constitutional Court's decision it still needed follow-up with the formation of new laws, amendments to the law or the formation of other legislation. This is a decision called non-self executing. This happens because the decision has influenced other norms and requires revisions or the formation of new laws or regulations that are more operational in its implementation, in other words, this decision cannot be immediately implemented (non-self executing) without legislation new or other legislative products because it creates a legal vacuum.

The statement above arises because the Constitutional Court's decision is now approaching the positive nature of the legislature. In this matter, Kelsen distinguished the legislative functions carried out by parliament and the courts. Parliament is a positive legislator because the parliament has the constitutional authority to make the law based on its own policy base, while the judiciary that has the authority to examine the law is negative

²⁶ Syukri Asyari, et. Al., "Model dan Implementasi": 694.

²⁷ A. Fickar Hadjar, et.al., *Pokok-Pokok Pikiran dan Rancangan Undang-Undang Mahkamah Konstitusi* [Principles and Thoughts and Draft Law of the Constitutional Court] (Jakarta: KRHN dan Kemitraan, 2003), 34.

²⁸ According to Jimly Asshiddiqie, the authority of the Constitutional Court can be related to the six functions of the Constitutional Court, one of which is as the Final Interpreter of Constitution. Jimly Asshiddiqie, *Konstitusi Ekonomi* [Economic Constitution] (Jakarta: Kompas Press, 2010), 50.

legislator because the judiciary carries out legislative functions in order to annul the law, an action that Kelsen considered as making a law negatively.²⁹ Nevertheless, Kelsen has warned from the beginning that the differentiation of parliamentary legislative functions from the judiciary as a positive legislator and negative legislator will fade when the judiciary enters the territory to protect the constitutional rights of citizens. The judiciary when examining cases in order to protect constitutional rights will explore and seek a measure of the scope of constitutional rights. In this context, the court will become omnipotent super legislators.³⁰

Kelsen's prediction above finally came true. The Constitutional Court in its practice in various countries tasked with protecting the constitutional rights of citizens changed to positive legislators. Christian Behrendt has conducted a research with a comparative approach that is concerned with the development of the model of decisions by the Constitutional Court in Belgium, France, and Germany where the judicial decisions contain an order to the parliament to draft legislation in accordance with the decision. In his final conclusion, Behrendt stated emphatically that there was no other choice but to ignore the negative theory of the legislator. This conclusion directs that the role of the court which has been so large in the legislative process emphasizes the position of the court which is also a positive legislator.³¹ The deviation from the restriction of the style of the decision by the Constitutional Court by giving rise to several variants of the decision on the consideration of realizing substantive justice was apparently regarded as a form of arrogance by the House of Representatives (DPR). This can be seen when Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court in Article 57 paragraph (2a) implicitly stipulates that the Constitutional Court is 'prohibited' to create a variant of a decision

²⁹ Hans Kelsen, *Teori Umum Hukum dan Negara* [General Theory of Law and State] (Jakarta: Bee Media, 2007), 327-328.

³⁰ Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe," *International Journal of Constitutional Law* 5, no. 1 (January 2007): 62-69.

³¹ Christian Behrendt, "Le Juge Constitutionnel, Un Législateur – Cadre Positif (The Constitutional Judge: A Positive Law Maker-Framework)" (Ph.D dissertation, University of Paris, 2005), 14-16.

that is not in accordance with the corridor of restriction as that has been set. The provisions are as follows:

Article 57

The verdict of the Constitutional Court whose verdict stated that the content of paragraph, article and/or section of the law contradicted the 1945 Constitution of the Republic of Indonesia, the material contained in the paragraph, article and/or section of the law had no power binding law.

The decision of the Constitutional Court which has its decision stated that the establishment of the said law does not fulfill the provisions for the establishment of laws based on the 1945 Constitution of the Republic of Indonesia, the law does not have binding legal force.

(2a) The decision of the Constitutional Court does not contain:

Amber other than as referred to in paragraph (1) and paragraph (2); order to the legislator; and the formulation of norms as a substitute for the norms of the law which are stated to be contrary to the 1945 Constitution of the Republic of Indonesia.

DPR felt that the decision variant that was often raised by the Constitutional Court castrated the legislative position as a positive legislator, so DPR then revised the Constitutional Court Law and regulated the provisions as above. But the ambition of forming this law was then broken by the Constitutional Court through its decision stating that the provision was contrary to the 1945 Constitution of the Republic of Indonesia through the Constitutional Court's decision. This is found in the Constitutional Court Decision Number 48/PUU-IX/2011 concerning review of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court. In consideration of the court point [3.13] stated that the provisions of Article 57 paragraph (2a) of Law 8/2011 are contrary to the purpose of establishing the court to uphold law and justice, especially in the context of enforcing the constitutionality of the norms of the law in accordance with the constitution. The existence of Article 57 paragraph (2a) of Law 8/2011 results in the obstruction of the court from (i) reviewing the

constitutionality of norms; (ii) filling the legal vacuum as a result of the Court's ruling which states that a norm is contrary to the constitution and does not have binding legal force.

Apart from the polemic above, the existence of a decision variant raised by the Constitutional Court can show the existence of non-self executing. The implementation of decisions that are non-self executing can be understood still requires the next stage, namely the follow-up by the executor of the decision both through the legislative and regulatory processes. The variant of the decisions mentioned earlier is essentially temporary (*einmalig*) until the executor of the Constitutional Court's decision takes over in the formation or revision of the legislation. This reflects the shift in the character of some of the Constitutional Court's decisions from self-executing to non-self executing.

2.2. Political Constellation in the Context of the Constitutional Court Decision

Judicial power is always inherent in politics, and basically, it is identical with concepts such as influence, persuasion, manipulation, coercion, force, and authority. In this context the nature of power can be reviewed into six dimensions, first, the potential and actual dimensions mean that one can have the potential for power, such as wealth, land, weapons, knowledge, social status, popularity and so on. Next, the dimensions of consensus and coercion are the two contradictory concepts. In the dimension of coercion, politics will be seen as a form of struggle, domination, and conflict, while the dimension of consensus, power is more interpreted as an effort to unite these various conflicts and make it a situation to organize society in general.³² For information that some scholars argue that Constitutional Court adopts strong form of constitutional review in deciding cases concerning economic and social rights.³³

³² Susanto Polamolo, "Nalar Fenomenologi; Mahkamah Konstitusi dalam Pusaran Kekuasaan dan Bahaya Krisis Weltanschauung [Phenomenology of Reason; The Constitutional Court in the Weltanschauung Crisis of Power and Danger]," *Journal of Konstitusi* 11, no. 2 (June 2014): 226.

³³ Philippa Venning, "Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court," *Australian Journal of Asian Law* 10, no. 1 (2008): 100-132.

The power constellation in Indonesia gives us a picture of a 'tradition of political hegemony', as mentioned earlier, that the Constitutional Court will be confronted with this tradition of hegemony based on articles which mention the duties and authority. The political tradition that is meant here is the question of the impossibility of a purely separate judicial institution with two other institutions (executive and legislative). Therefore, Article 18 of Law No. 24 of 2003 openly implies an exclusive relationship from each institution; this is where the reality of a hegemonic tradition is developing in a structural and administrative direction. In the power orientation, Indonesian politics before and after the reformation cannot be said to experience significant changes, where it can be measured in an orientation perspective. The main orientation of Indonesian politics still revolves around the idea of power and not the effectiveness of power use. This is really surprising because power struggles can only be justified if it can be shown that in practice they are able to use power exercise in a way that brings benefits to as many people as possible.³⁴

The study proves that law is a political product so the character of the contents of each legal product will be very determined or colored by the balance of power or political configuration that gave birth to it. A fact that cannot be denied, that the formation of law in a country including in Indonesia cannot be separated from the influence of the prevailing political system, including in this case the influence of the national political system of the country itself.³⁵

Events that occur in the contextual context in this matter regarding the Constitutional Court's decision, it does not necessarily make the Constitutional Court's decision directly understood deterministically-empirically, that is, from the judge's decision then trigger the implementation that is in accordance with

³⁴ In the case of Indonesia, it is very evident that the impetus for power struggles is far higher than the impetus for the right use of power. Symptoms such as the emergence of so many political parties are intensively consolidating themselves to form external organ units, on the other hand, the parties that consolidate with the support of a broad constituency actually experience a split into (internal fractioning). There is a complicated typology in this section, but from the large currents of political power that are currently consolidating, on the one hand, they weaken each other's positions, which is due to political institutionalization being sacrificed in favor of political personalization. See the comparison study in Saiful Arif, *Demokratisasi Sistem Politik dan Pemerintahan* [Democratization of Political and Government Systems] (Aveross Press, 2011), 38.

³⁵ Atom Ginting Munthe, "Postur 'Rasionalis' dalam Politik Luar Negeri Indonesia Pasca Suharto [Rationalist Posture in Post-Suharto Indonesian Foreign Policy]," *Law Journal of Pro Jusitia* 24, no. 3 (July, 2006): 191-202.

the decision's conclusions and finally leads to changes in the implementation of state affairs. As well as the development of political thought which is capable of encouraging various constitutional structure inventions, the same thing applies to the implementation of the Constitutional Court decisions that are influenced by the existing political process.

Ideally, the establishment of the Constitutional Court in Indonesia aims to strengthen the protection of constitutional democracy. The state, in this case, the Indonesian government, must guarantee the fulfillment of the constitutional rights of its citizens which have historically been suppressed by integralist policies and political authoritarianism of the New Order regime. As for the trend of modern state administration, government policy is outlined in a written positive law formulation which is the result of political representation of the people's representatives, and which then applies to the public.³⁶

A number of decisions of the Constitutional Court regarding the constitutional review indirectly have encouraged the political process. This is one of the legal consequences of the Constitutional Court's decision which has a role in encouraging the political process to change the law. One of the legal consequences that can be caused by a Constitutional Court decision is that it can nullify or create a political process, to ensure that the prevailing political practices continue in accordance with the constitutional corridor.

Although the decision is final and binding, but the reality is sometimes that the decision of the Constitutional Court is not obeyed or canceled by the legislator. The House of Representatives and the President as legislators have no Constitutional Court ruling. Law Number 12 of 2011 concerning the Establishment of Legislation, one of the materials for the completion of the law is a follow-up to the decision of the Constitutional Court. These conditions cause the Constitutional Court's decision as if it has no meaning because there is no role for legislators (DPR and President) who cannot and do not follow

³⁶ Yance Arizona, et.al., *Pancasila dalam Putusan Mahkamah Konstitusi (Kajian terhadap Putusan Mahkamah Konstitusi dalam Perkara yang Berkaitan dengan Perlindungan Hak Kelompok Marjinal)* [Pancasila in the Constitutional Court's Decision (Study of the Constitutional Court's Decision in Case Related to Protecting the Rights of Marginalized Groups)] (Jakarta: Epistema Institute, 2014), 5-6.

up on the Constitutional Court's decision. Therefore, it is necessary to find a solution to the ruling of the Constitutional Court in making the law for the Constitution can be obeyed by the legislator.³⁷ The substance of the politically charged law can be used by law, with expectations that occur in accordance with the will of the community, and also in accordance with the will of the Constitution. Therefore, those who consider their constitutional rights and/or authorities to be disadvantaged as a result of their decision to act can exercise the judicial review of the Constitutional Court. The constitutional rights referred to the rights stipulated in the 1945 Constitution of the Republic of Indonesia. This judicial review is important in order to maintain law order so that there is no material conflict between conventions. The decision of the Constitutional Court which discusses the making of the law with the 1945 Constitution of the Republic of Indonesia was conveyed to the House of Representatives, the Regional Representative Council, the President, and the Supreme Court.

Submission of the Constitutional Court's rules to the DPR and the President can force state institutions and law-making institutions immediately follow up on the decision of the Constitutional Court. Although the Constitutional Court decision is final and binding, the reality is that sometimes the Constitutional Court's decision is not followed up by DPR or the President.

For example, the decision of the Constitutional Court Number 10/PUU-VI/2008 concerning a judicial review case of Article 12 letter c of Law Number 10 of 2008 concerning General Elections of Members of the People's Legislative Assembly, Regional Representatives Council, and Regional People's Representative Council (the Election Law of the DPR, DPD and DPRD/Regional Peoples Representatives Council). Article 12 of Law Number 10 Year 2008 that does not include domicile and non-political party requirements for prospective DPD members, and Article 67 of Law Number 10 Year 2008 which does not contain provisions on the need for a National Identity Card (KTP) in the province to be represented and Non-

³⁷ Widayati, "Problem Ketidakpatuhan terhadap Putusan Mahkamah Konstitusi tentang Pengujian Undang-Undang [Problems of Non-Compliance with the Constitutional Court's Decision Regarding Judicial Review]," *Journal of Pembaharuan Hukum* IV, no. 1 (January - April 2017): 2.

political party approval for the completeness of the requirements for prospective DPD members. This means that what is being requested by the applicant is the absence of norms and non-party political norms in Article 12 and Article 67 of Law Number 10 Year 2008, not the norms that are formulated in full in article, paragraph, or part of the law. In its ruling, the Constitutional Court stated that Article 12 letter c of Law Number 10 Year 2008 remained constitutional as long as it is interpreted in the province to be represented. The subject of debate is Law Number 8 of 2012 concerning the Election of Members of the DPR, DPD, and DPRD, the terms of domicile of the DPD members are still regulated, namely in Article 12 (c) that is approved, “residing in the territory of the Unitary Republic of Indonesia”. The sound of the provision is the same as the sound of the article in the law that has been cancelled by the court. Likewise in the latest law, Law Number 7 of 2017 concerning General Elections. The *a quo* law may not be interpreted by the Constitutional Court which requires the provision of candidates for DPD members to remain constitutional in the provinces to be represented. This is a form of discrepancy in the follow-up to the Constitutional Court’s decision because the norm returned by the Constitutional Court. This is not following Article 10 paragraph (1) of Law Number 12 of 2011 concerning the Formation of Regulations that contain material that must be regulated by laws and regulations which contain all provisions concerning applicable laws and regulations.

Even though the Constitutional Court’s ruling is *erga omnes*, it is not a constitutional court ruling that is not only for judicial review applicants who request the use of the law but also for all parties related to the Constitutional Court’s ruling. The Constitutional Court as a judicial institution for its decisions is obeyed and acted upon, because it is a legal responsibility for the legislators, and also the implementation of the decision on constitutional formation for citizens granted by the Constitution of the Republic of Indonesia. In 1945, especially those who wanted to hear the review of the Constitutional Court.

2.3. Legal Impact of Disobedience of the Constitutional Court's Decision

According to Achmad Ali, the legal consequences are a result given by law, for an act of legal subject. Furthermore, he identified legal consequences in 3 (three) groups:³⁸

- 2.3.1. Legal consequences in the form of birth, change or disappearance of certain legal rules;
- 2.3.2. Legal consequences in the form of birth, change or disappearance of a particular legal relationship; and
- 2.3.3. Legal consequences in the form of sanctions.

Non-compliance with the decisions of the Constitutional Court can be implemented because there are no instruments or institutions that provide legal responsibilities that are final and binding. The final decision and all the Constitutional Courts are very beneficial for everyone outside the Constitutional Court to follow up on the final and binding decision.³⁹ Although in Article 24C paragraph (1) of the Constitution of the Republic of Indonesia of 1945 only states that the decision of the Constitutional Court is final, it is not followed by the word “binding”, but it can be stated that the final decision of the Constitutional Court means relating to the decision of the Constitutional Court, once the verdict was finished. The basis for the implementation of the Constitutional Court's ruling on those relating to the decision, to separate the decision, without any coercion. Therefore, it is the implementation of the Constitutional Court ruling, moral awareness and also legal awareness of the relevant institutions.⁴⁰ The implementation of the Constitutional Court's ruling is also automatic, not the executing agency. Therefore moral awareness and also legal awareness for parties related to the Constitutional Court's ruling, because the implementation of the Constitutional Court's ruling is also a constitutional obligation for the parties related to the decision of the Constitutional Court. The implementation of the

³⁸ Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis & Sosiologis)* [Revealing the Veil of Law (A Philosophical & Sociological Study)] (Jakarta: PT. Toko Buku Agung, 2002), 251.

³⁹ Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi pada Pengujian UU terhadap UUD* [Problems with the Implementation of the Constitutional Court's Decision on the Constitutional Review] (Jakarta: Raih Asa Sukses, 2015), 233.

⁴⁰ *Ibid.*

Constitutional Court's ruling is automatic and there is no institution responsible for resolving the Constitutional Court's ruling. There is no provision for parties who do not and do not follow up on the decisions of the Constitutional Court. The disobedience of litigants, including the legislative bodies implementing the Constitutional Court's ruling, can in some way affect the rules, and even if repeated non-compliance occurs, the community is increasingly disadvantaged for the Constitutional Court. When the problem is made by the Constitutional Court's decision to continue as it is now, it can be a future, and the Constitutional Court will be issued by justice seekers. The problem is, there are no formal rules or regulations that govern the implementation of the Constitutional Court's ruling. The House of Representatives and the Government as parties directly related to the decision of the Constitutional Court, namely responding to and carrying out the decisions of the Constitutional Court, immediately follow up. Therefore, to maintain legal order with regulations that stipulate that its hierarchy is lower must not be contradictory to higher regulations, it will attach laws with laws that cost contrary to the 1945 Constitution of the Republic of Indonesia, the DPR and the President must immediately be obeyed and acted upon by the President to immediately amend the law to be adjusted to the decision of the Constitutional Court.

In the judiciary tradition that has been developing for a long time, a decision must have binding nature, because this is related to the absolute authority of the judiciary, which has the power to make judgments. Of course it is useless if a decision that takes the process sometimes takes a very long and tiring tempo, but in the end, it does not have binding legal force, the result is just a waste. Problems at the level of implementation/execution of decisions like this are often the organs of the Constitutional Court, because there is no executorial institution for the decisions of the two courts, and there is no threat of serious sanctions if they do not implement the decisions of both organs.⁴¹ During this time the implementation of the Constitutional Court's ruling only relied on good

⁴¹ Denny Indrayana and Zainal Arifin Mochtar, "Komparasi Sifat Mengikat Putusan Judicial Review Mahkamah Konstitusi dan Pengadilan Tata Usaha Negara [Comparison of the Binding of Judicial Review Decisions of the Constitutional Court and the State Administrative Court]," *Journal of Mimbar Hukum* 19, no. 3 (October 2007): 442-443.

cooperation/relations between the Constitutional Court as an institution judicial with the legislating organs (DPR and the President), as well as the implementing organs of the law (government). If there are no good intentions from the three organs, which are affected by the implications of the Constitutional Court's decision, of course, the Constitutional Court's decision will only be a waste, or just become a paper tiger, which has no implementation power.

Judicial power is the weakest branch of the three branches of power that exist; therefore its authority is only as a case breaker. The rest to execute the decisions issued, the judicial organ requires the intervention of the executive to become the executor. Although the Constitutional Court currently has extraordinarily high authority, namely as an authoritative organ to conduct the constitutional review, which means that it serves to limit and supervise other state organs to run in the corridors set by the constitution, but it cannot guarantee the implementation of the provisions outlined by the Constitutional Court. Even it is often denied. Especially now with the tendency towards judicial activism, where the role of the judicial institution as the guarantor of the constitution will be increasingly dominant, the decision of the Constitutional Court will be subject to fierce challenges from non-judicial state actors affected by the Constitutional Court's decision.

Therefore, the constitution and the regulation that regulates the authority of the Constitutional Court in listing final words are always followed by the final and binding words. These courts can persuade other government bodies that their judgment is substantially in line with the practices of other democratic countries.⁴² Although it has been stated explicitly, the decisions of the Constitutional Court are denied or ignored by the legislating organs and/or other non-judicial actors, especially if the two words are not stated side by side and explicitly, it is possible to interpret that the decisions are the final is not necessarily binding, because there are no provisions that explicitly regulate it.⁴³ The actual impact of judicial

⁴² Taavi Annus, "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments," *Duke Journal of Comparative and International Law* 14, no.2 (2004): 344.

⁴³ Ahmad Syahrizal, "Problem Implementasi Putusan MK [Problems of the implementation of the Constitutional Court's Decision]," *Journal of Konstitusi* 4, no. 1 (March 2007): 115.

decisions often depends on the behavior of executive and legislative bodies that implement the rulings. Consequently, when a court hears a case involving the interests of those controlling the executive and legislative institutions, those interests can threaten to obstruct the court intended outcome. This is also evident from several Constitutional Court decisions that are not applicable because they seem to be ignored by the decision address. Based on the analysis conducted on the constitutional court's decisions related to forestry, plantations, and mining, it can be said that the level of compliance of state administrators can be seen based on whether or not a constitutional court decision is granted which is either partially or wholly by state administrators, DPR, to the judiciary. The government and the DPR appear to be more disobedient to the decisions of the constitutional court. One of them seemed in the absence of a constitutional court decision that cancels a norm in the Plantation Law but it is not accommodated by the government and parliament in revising the Plantation Law, then there is also no response from the government to the decision the constitutional court related to the judicial review of the Forestry Law, especially regarding the issue of the mechanism of inauguration and abolition of customary law communities as mandated by Article 67 paragraph (1), paragraph (2), and paragraph (3) of the Forestry Law which is considered constitutional by the Constitutional Court but the government instrument to date mechanism inauguration and abolition of indigenous law community does not yet exist. Slightly different from the general court that handles criminal acts of natural resources that are more obedient to the decisions of the constitutional court by using the decisions of the relevant constitutional court as a consideration in deciding cases.⁴⁴

As a result, the Constitutional Court's decision is not implementable in its character, when it reaches the application stage, the Constitutional Court Decision will be blocked by many obstacles that interfere with the execution of the decision. Therefore it is necessary to have a collective awareness strategy of all

⁴⁴ Adam Mulya Bunga Mayang and Adeline Syahda, *Kepatuhan Penyelenggara Negara terhadap Putusan Mahkamah Konstitusi (Analisis Terhadap Putusan Mahkamah Konstitusi tentang Kehutanan, Pertambangan dan Perkebunan)* [Compliance of State Administrators on Constitutional Court Decisions (Analysis of Constitutional Court Decisions on Forestry, Mining and Plantations)] (Jakarta: Yayasan Konstitusi Demokrasi Inisiatif, 2017), 34.

state institutions and other non-state organs, to jointly apply the Constitutional Court's decisions to conditions that are clearly desired by the constitution. The implementation of the Constitutional Court's ruling will be very absurd without a positive response from the legislative and the government forming organs in general. During this time there are often gaps and disparities between the stages of reading and the implementation of final decisions in the field. If this big problem is left unchecked, undoubtedly the decision of the Constitutional Court will only have a symbolic power that adorns the state news sheet.

III. CONCLUSION

Based on the discussion above, related to the shift in the character of the constitutional court's decision from self-executing to not self-executing, it came to the conclusion that the dynamics were influenced by Indonesia's political conditions which influenced the constitutional court judges. *Adressat* often ignore the decisions of the Constitutional Court and policy makers as if they do not obey so that the Constitutional Court's decision cannot be implemented to create a state that remains unconstitutional. The reality is that sometimes the Constitutional Court's decisions are ignored and are not followed up by the legislative council of the people and the President as the legislative body. Because of it, Constitutional Court judges must try to find legal breakthroughs in the corridors of judicial activism to create applicable constitutional review decisions. The judges created a decision variant that was more directed to the decision of non-self executing. The existence of the nature of non-self executing because to carry out the Constitutional Court's decision still needs to be followed up with the next, namely the follow-up by the executor of the decision either through the legislative or regulatory process. It was said so because the ruling influenced other norms and requested a revision or making new laws or regulations that were more operational in their implementation. In other words, this decision cannot easily be carried out without the presence of new laws or other regulatory products because it can lead to a legal vacuum. This is what reflects the change

like the Constitutional Court from self-executing to non-self executing. In the end, the *adressat* of the decision as a policy maker must inevitably follow up.

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